IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 49 OF 2004

WITH

FAMILY COURT APPEAL NO. 50 OF 2004

Mrs. Manisha Sandeep Gade .. .. Appellant

V/s

Sandeep Vinayak Gade .. .. Respondent

Ms. Kiran Bhagalia with Ms. Lalita Panchakshari for the appellant.

Mrs. Manjula Rao with Ms. Kokila Kalra for the respondent.

CORAM : H.L. GOKHALE &
SMT.V.K. TAHILRAMANI, JJ.

RESERVED ON: 5TH AUGUST 2004

DECLARED ON: 1ST OCTOBER 2004

JUDGMENT: (Per H.L. Gokhale, J.)

1. These two appeals filed by a wife seek to challenge the common judgment and order dated 12th February 2004 passed by Family Court No.III at Pune in Petition No.A-827 of 2000 and Petition No.C-55 of 2002. Petition No.A-827 of 2000 was filed by the respondent husband seeking divorce on the ground of cruelty under section 13(1)(ia) of the Hindu Marriage Act, 1956. Petition No.C-55 of 2002 was filed by

the appellant wife seeking permanent maintenance under section 18 of the Hindu Adoptions and Maintenance Act, 1956. The impugned common judgment allowed the petition filed by the respondent husband seeking divorce and dismissed the petition filed by the appellant wife for maintenance. It is, therefore, that these two appeals are filed by the appellant wife arising out of the two proceedings.

2. The short facts leading to these appeals are as follows:

. The appellant and the respondent were married as per the Hindu Vedic Rites on 19th December 1997. Soon thereafter, differences developed between the two and they are not living together from 25th August 1999, though it is the case of the appellant that she was driven out of the matrimonial home. There is no child from this marriage. The appellant wife has her own employment and it has come in evidence that her monthly salary was Rs.6,000/-, out of which take-home amount was Rs.5,300/-. The respondent husband was working as a teacher with a salary of Rs.3,000/- as per the salary slip, the take-home amount being Rs.2,940/-. It is the claim of the appellant wife that the respondent was also running the business of advertising and had additional income therefrom.

3. The respondent husband raised various grounds to substantiate his case for cruelty. As enumerated by the learned Family Court Judge, there were in all six instances of cruelty, they being as follows:-

(i) Refusal to do domestic work.

(ii) Insulting and abusing.

(iii) Insisting on having a separate residence.

(iv) To visit the matrimonial home and not to return on a number of days every week.

(v) Threatening and terrorising the husband and his parents.

(vi) Not disclosing that she had some gaenacological problem prior to marriage and concealing her miscarriage which took place sometime in December 1998.

The appellant wife denied these allegations, but over and above the denials, she made certain allegations of her own in para 5(K) and (L) of the written statement. In para 5(K), she mainly made three allegations; (i) the respondent behaved with her perversely and harassed her sexually; (ii) he would indulge in obscene talks with his girl friends on phone and in person and would behave immodestly with the girl friends to torture the appellant, (iii) he had illicit relationship with one Leena, wife of Vivek, and in fact he wanted to marry

her. In para 5(L), she made allegations against her father in law that his behaviour with her was improper and in that she alleged that (i) he would touch her unnecessarily and (ii) he would barge into the kitchen if she was changing her clothes.

4. The respondent examined himself and then led the evidence of a few supporting witnesses, including his mother. The appellant examined herself and a few supporting witnesses. The examination-in-chief was by way of filing affidavits on the basis of which the cross-examination was conducted. After recording this evidence, the learned Judge came to the conclusion that the appellant had failed to establish the six specific instances of cruelty. He, however, took the view that the allegations made by the appellant in her written statement were baseless and amounted to cruelty. The learned Judge noted that with respect to the allegations about relationship between the respondent and Leena, except the bare words in the affidavit of appellant, there is no other evidence on record. He commented that it was her duty to examine Vivek. Similarly with respect to the allegations against the father of the respondent, the learned Judge noted that the allegations were vague and she should have given some details about the same. He, therefore, allowed the petition filed by the respondent husband on the ground of cruelty and

granted the decree of divorce. Since he was granting the decree of divorce, he examined the question as to whether the appellant wife was entitled to permanent alimony under section 25 of the Hindu Marriage Act. Having however noted that the income of the appellant wife was more, he held that she was not entitled to permanent alimony.

5. As far as the other petition under section 18 of the Hindu Adoptions and Maintenance Act, 1956 is concerned, since the learned Judge was dissolving the marriage between the two, he took the view that the appellant wife could not claim relief under section 18 of the said Act since sub-section (1) of section 18 of that Act gives a right to a Hindu wife to maintenance, which right is available during the subsistence of the marriage. The said section also provides for the right of residence to a wife. However, that right would be available if the husband is guilty of cruelty. That apart, on the facts of the case, the learned Judge was of the view that the respondent husband did not have such capacity to provide any separate residence. He, therefore, dismissed the petition for maintenance filed by the appellant wife under the Hindu Adoption and Maintenance Act, 1956.

6. It is material to note that whereas the wife has

filed FCA No.49 of 2004 to challenge the order of divorce which is granted in view of her baseless allegations, the respondent husband has not filed any cross objection to the extent the learned Family Court held that the six instances of cruelty claimed by him were not established. Therefore, the question as to whether those items specifically pleaded by the respondent husband constituted cruelty or not no longer survives. The respondent husband not having challenged the finding on those six items, it will have to be held that he has accepted that he has failed to establish the allegations of cruelty on those grounds. We may as well add that the counsel for the respondent also did not press any of those instances in argument.

7. When these appeals came up for admission, on a query from the court, the counsel for the respondent informed the court that he had not remarried. That was in spite of the impugned order having been passed on 12th February 2004. A statement was made by his counsel on 8th July 2004 that he will not proceed to take any further steps to marry until further orders are passed in these appeals. Inasmuch as there was no possibility of the parties living together any more, an attempt to dissolve the marriage by consent was made, but that did not succeed. On 15th July 2004, the matter was adjourned to 22nd July 2004 making it clear that in the

event the parties do not arrive at any understanding, both the matters will be heard finally at the admission stage itself. The paper-book was filed by the parties which consisted of the copies of the entire record of the Trial Court. They were accordingly heard fully at the admission stage since the counsel for both the parties desired that the parties should know their fate at the earliest, particularly since both the appellant and the respondent are young.

8. As stated above, the question which arises for consideration is as to whether the learned Judge of the Family Court was right in granting divorce merely on the basis of the allegations made by the appellant wife in her written statement. In this connection, the further submission of the counsel for the appellant is that the least that was expected of the respondent was to amend his petition and the respondent ought to have raised the plea that he has suffered cruelty in view of the allegations made in the written statement. Thereafter specific evidence on that behalf should have been led before any such conclusion was arrived at. In the absence of any such plea being raised by amending the petition, the respondent should not have been allowed to argue the plea of cruelty merely on the basis of the allegations made in the written statement. Alternatively, it is submitted that in any case at the

highest it could be said that the appellant has failed to prove her allegations, but it does not mean that she has made false and baseless allegations and therefore the decree of divorce was not called for. As against that, the submission of the respondent is that the allegations are so wanton that they have to be only noticed to examine whether they will constitute cruelty or not. If that is so, the decree of divorce ought to follow inasmuch as section 13(1)(ia) of the Hindu Marriage Act, 1956 speaks of "treating the other party with cruelty". The phrase is wide enough and would cover a cruel treatment even subsequent to the filing of the petition by making baseless allegations in the written statement. That being so, there is no need to amend the petition and on the strength of such allegations themselves, the decree of divorce ought to follow.

9. Before we look into the submissions and the supporting authorities, it will be desirable to look into the specific averments in this behalf and the evidence led thereon. Now as far as para 5(K) and (L) of the written statement are concerned, para 5(K) contained three allegations; (i) the respondent behaved with the appellant perversely and harassed her sexually; (ii) he would indulge in obscene talks with girl friends and behaved immodestly with them to torture the appellant, and (iii) he had illicit relationship with

one Leena, wife of Vivek. Inasmuch the entire case of both the parties depends on these pleadings, it would be desirable to reproduce these two paragraphs in their entirety. Para 5(K) and (L) read as follows:-

> "(K) The Petitioner then started behaving perversely. He would not only harass the Respondent sexually but also would indulge to obscene talks with his girl friends on phone and in person. Once the Petitioner and the Respondent visited the Petitioner's girl friend at Nasik, all of them went to a hotel. The Petitioner, in the presence of the Respondent, behaved immodestly with the girl friend so as to torture the Respondent. The Respondent then started getting anonymous phone calls at her office regarding Petitioner's girl friend and his amorous behaviour. One Mrs.Leena was an acquaintance of the Respondent. Shri Vivek was Leena's husband. Vivek asked the Respondent whether she knew about the adulterous conduct of the Petitioner. The same afternoon, about 2.30 p.m. the said Vivek came to the Respondent's office and told the Respondent that the Petitioner was pastering his wife who had recently delivered a son. He further informed

the Respondent that the Petitioner was telling his wife that the Petitioner liked her and that wished to marry her. The Petitioner had also informed Vivek's wife that the Petitioner wished to divorce the Respondent as he thought that the Respondent could not bear a child for him. The Respondent was stunned at this revelation. The said Vivek also threatened that if he came to know the Petitioner's residence address, then he would beat him. The Respondent pleaded with him not to do so. The Respondent after going home talked to Petitioner's parents about the same and called the Petitioner on pager. The Petitioner in front of his parents admitted that he had been visiting Mr.Vivek's wife and that he had proposed marriage to Vivek's wife. The Respondent in presence of the Petitioner and his parents gave a call to Mr. Vivek's residence and talked to his wife. The said conversation was also heard by Petitioner's father. Ultimately the Petitioner, his mother and the Respondent went to Mr.Vivek's residence whereupon the Petitioner begged Mr.Vivek's wife pardon. The Respondent was in a devastated state of mind and stayed with her parents for two days, however, at that point of time, she did not disclose the above mentioned fact to her parents as she

thought that they also would become worried. After staying with her parents for two days, the Respondent returned to her matrimonial home. The Petitioner then thought that the Respondent was helpless and was in no position to punish him for his misdeed and so he started taunting the Respondent that in spite of knowing his infatuation for other married women, the Respondent could not punish him any way.

"(L) Since the beginning of the marriage, the Respondent used to notice that the behaviour of the Petitioner's father with her was improper. The Petitioner's father would touch the Respondent unnecessarily and would always barge into the kitchen if the Respondent was changing her clothes. The Respondent had made a complaint with the Petitioner about the Petitioner's father behaviour. However, instead of talking to his father, the Petitioner chose to shout at the Respondent and tell her that she should be more careful whenever his father was present. The Petitioner's father's behaviour was also known to the Petitioner's relatives who used to advise the Respondent to stay separately or at least to go to sleep at night at the separate residence."

10. The respondent had filed the petition for divorce and, therefore, he started the evidence first. He filed an affidavit in lieu of examination-in-chief. In the second sub-para of para 18, he dealt with the allegations in para 5(K) though there is no specific reference to para 5(K) as such. The relevant statement when translated from Marathi reads as follows:

> "Besides, false allegations have been made against me. It is false to contend that I have girl friends and that I have harassed her (wife) by talking about them with her. Leena is (only) a friend of the respondent (husband). Nothing happened after going to Nasik."

As far as the allegations against the father of the respondent are concerned, it is stated as follows in first part of para 18.

> "I am employed only in a school and therefore it is wrong to contend that I have a higher income. We had complete privacy in our house. We had a separate room. Therefore it is false to contend that she (wife) felt constraints over there or that my father used to peep when she was changing her clothes. My father has never entertained bad thoughts about her nor has he behaved in bad

> manner with her. He was lying in his bed after his operation and therefore there was no substance in alleging that in that period his misbehaviour increased. Similarly, it is incorrect to say that my mother supported my father's behaviour. Therefore, it is false to contend that in July 1999 when the respondent (wife) was alone in the house, she raised her voice and people gathered, etc."

In para 19 of the affidavit, the respondent has stated further as follows:

> "The respondent (wife) had no difficulty in my house nor was anybody criticising her. Forget asking her to do any work, the respondent was never doing any work in the house. On the other hand, she used to behave in an obstinate manner and use to abuse. She used to call us as hutment people. The respondent has thus made false allegations against myself and my father and I do not admit them. She ought to prove them with evidence."

In the entire cross-examination of the respondent husband, there are no questions put to him with respect to the allegations made in para 5(K) or 5(L). The

cross-examination is entirely on other aspects of cruelty. Thus, it appears that although the appellant made certain allegations against the respondent and his father in her written statement and although the respondent did deny them in his own way in his examination-in-chief, he has not been cross examined on those aspects.

11. The mother of the respondent Smt. Vasanti Gade was examined in support of the respondent. She also filed an affidavit in lieu of examination-in-chief. In para 7, she has denied the allegations against her husband. She has stated that the dirty allegations made by Manisha (appellant) have caused severe mental agony to Sandeep (respondent) and all of them. This para when translated from Marathi reads as follows:-

> "9. The allegations made by Manisha (appellant) against my husband are false. Nothing of the kind ever happened. Firstly, his health was not good. Manisha never cared to come and see him when he was in hospital nor did she serve him at home. Yet she has made dirty allegations because of which severe mental agony has been caused to Sandeep (respondent) and all of us.
>
> 10. .....
>
> 11. .... The behaviour of Manisha has not only

caused physical and mental agony to Sandeep, but severe mental agony has been caused to our entire family....."

As far as this evidence of the mother of the respondent is concerned, in her cross-examination no question has been asked to her with respect to the allegations made in para 5(K) or 5(L). She has not been cross-examined on the above deposition either. The other witnesses examined by the respondent were a neighbour Vishwanath Bhat, his uncle Pradeep Gade and one Dr.Karus Koyaji. They deposed with respect to the different aspects of cruelty pleaded by the respondent in his petition. Similarly as far as the appellant is concerned, she examined her mother Shailaja Bachate and the son of her mother's sister (Satish Mokashi) on the allegations of cruelty made in the petition. As stated earlier, the finding given by the Family Court Judge on these aspects is against the respondent and he has not chosen to challenge the same. Hence these depositions are not being discussed.

12. As far as the appellant is concerned, she affirmed an affidavit in lieu of examination-in-chief which is identical to her written statement and in para (K) and (L) thereof, she repeated para 5(K) and (L) of her written statement verbatim and, therefore, the

statements in her affidavit are not reproduced hereafter to avoid unnecessary duplication. She has been cross-examined with respect to the statements in para (K) in para 11 of her cross-examination. In later part of para 11, the appellant has stated as follows:-

> "..... I and Petitioner Sandeep had gone to Nasik on two wheeler from Pune. It is correct that we had stayed for one day though there were houses of relatives of the Petitioner at Nasik. It is correct that I and Petitioner had gone to a photo studio of the classmate (girl) of Petitioner Sandeep. She had given lunch to us. It is not true to say that I have mentioned falsely that the Petitioner Sandeep misbehaved in the hotel in my presence. It is not true to say that I have mentioned falsely in the affidavit that the Petitioner was talking personally to his girl friends on phone etc. and therefore I was suffering from trouble. Leena was my friend. I introduced Leena to Petitioner Sandeep. It is not true to say that when the Petitioner Sandeep had gone at the house of Leena, I raised quarrel with him. It is not true to say that there was love marriage of Leena. It is correct that I myself, Petitioner and the mother of the Petitioner had gone at the house of Leena to

ascertain the intimacy between the Petitioner and Leena. It is not true to say at that time the family members of Leena got angered and assaulted me. It is not true to say that I made false allegations regarding the intimacy between the Petitioner and Leena."

As far as the allegations against the father of the respondent are concerned, she has stated as follows in para 13 of her cross-examination:-

"It is not true to say that I made false allegations against the father of Petitioner Sandeep in the affidavit. It is not true to say that I have mentioned falsely that the father of Petitioner was touching my body deliberately to give sight our place. It is not true to say that I have mentioned falsely in the affidavit that after the operation of the Petitioner, his behaviour was changed. It is not true to say that I have mentioned falsely in my affidavit that the misbehaviour of the father of the Petitioner was increased and I informed about it to my mother in law and my mother in law told her helplessness. It is also not true to say that I have also mentioned falsely in the affidavit that at Mumbai my father in law misbehaved and hence I

told them I would call the people and therefore I was saved. It is not true to say that I have stated falsely in the affidavit that I have mentioned to the Petitioner about the said incident and the Petitioner raised his voice against me. It is not true to say that I have mentioned falsely in the application that my parents tried to give understanding to the Petitioner and Petitioner assured my parents that he would give understanding to his mother. About the misbehaviour of the father of the Petitioner, I have stated to Petitioner Sandeep himself. It is not true to say that as I wanted to live separately, I made false allegations against Petitioner Sandeep."

13. When we analyse this evidence, the following position emerges:-

(i) It is material to note that although the appellant had stated in para 5(K) of the written statement that Vivek, the husband of Leena (with whom the respondent was alleged to have illicit relationship) had threatened to beat the respondent, she did not lead his evidence in support of the allegations made by her. Thus, from what is noted above, although the respondent denied the allegations against his father and the allegations

against himself also, he has not been cross-examined at all on his deposition concerning either of the two allegations made by the appellant.

(ii) The respondent's mother also specifically denied in her affidavit the allegations made against his father and also stated that all those allegations caused severe mental agony to the respondent and his family. She has not been cross-examined at all on either of these aspects.

(iii) It is only in her affidavit in lieu of examination-in-chief that the appellant has repeated whatever that is stated in the written statement. As noted above, in para 11 of her cross-examination, she has been cross-examined with respect to the alleged intimacy between the respondent and the earlier mentioned Leena. In para 13, she has been cross-examined with respect to the allegations made by her against the father of the respondent. Thus, whereas the appellant made serious allegations against the respondent and his father, she has not cross-examined the respondent or his mother on their statements concerning these allegations. She has not put her case to them in their cross examination to give them an opportunity to explain their position. On the other hand, she has been confronted on these allegations when she stepped into the witness box but she

has not led any supporting evidence although she claimed that the husband of the earlier mentioned Leena, Vivek, was a brave man and would have thrashed the respondent if he was to get the address of the respondent.

(iv) The mother of the respondent had specifically stated on oath that the dirty allegations made by the appellant and her behaviour had caused severe mental agony to the respondent and his family members. This statement has gone uncontroverted. Thus although there is no amendment of the pleadings, the mother of the respondent has deposed that the allegations made by the respondent caused severe mental agony. The respondent has deposed that the appellant has made false allegations against him and his father. There is no cross-examination of mother as well as of the respondent on these statements. On the other hand, the appellant who made the allegations has led no evidence in support thereof. As against that, she has been effectively cross-examined on the allegations made by her and it has been put to her that each of her allegations are false. The appellant has maintained her position that her imputations were correct, however, she has admitted that she had gone to the residence of Leena along with the respondent and his mother to ascertain about the alleged intimacy between the respondent and Leena. It was put to her that family members of Leena became angry on the

appellant on knowing the allegation and they assaulted the appellant. She has denied the suggestion but it indicates that the allegation was considered false by Leena and her relatives also.

14. On the question of allegations in the written statement constituting cruelty, Mrs.Rao, learned counsel for the appellant, referred to the leading judgment in the case of **V. Bhagat v. Mrs. D. Bhagat AIR 1994 SC 710**. In that matter, a petition for divorce on the ground of mental cruelty was filed by the appellant husband who was a practicing advocate. This was on the ground of alleged adulterous behaviour of the respondent wife. The respondent wife in her written statement alleged that the husband and all members of his family were lunatic and streak of insanity ran through his entire family. As recorded by the Apex Court in para 22 of that judgment that in spite of that, she wanted to live with the petitioner husband. The Apex Court observed thereafter at the end of this para 22 as follows:-

> "The obvious conclusion is that she has resolved to live in agony only to make life a miserable-hell for the petitioner as well. This type of callous attitude in the context of the facts of this case, leaves no manner of doubt in

> our mind that the respondent is bent upon treating the petitioner with mental-cruelty. It is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together, or living together again. Having regard to the peculiar features of this case, we are of the opinion that the marriage between the parties should be dissolved under section 13(1)(ia) of Hindu Marriage Act and we do so accordingly."

Ms.Bhagalia, learned counsel for the appellant, however, pointed out that in para 23 of the judgment, the Apex Court had given a clarification. In the facts of that case, the appellant husband was making attempts to get divorce from 1980 onwards and the matter was being disposed of in the Apex Court under this judgment decided on 19th November 1993. In para 23, the Apex Court gave the following clarification:-

> "Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter-allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extraordinary features to

warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial. Irretrievable break-down of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the Court finds it in the interest of both the parties."

15. In the above referred judgment in the case of V. Bhagat v. Mrs. D. Bhagat (supra), the Apex Court referred to an earlier judgment in the case of **Smt. Chanderkala Trivedi v. Dr. S.P. Trivedi 1993 (3) SCALE 541 = (1993) 4 SCC 232**. In that matter, the husband had sued for divorce on the ground of cruelty. The wife filed the written statement attributing adultery to the husband. In reply, the husband put forward another allegation against the wife that she was having undesirable association with young boys. The Apex Court observed in para 2 of its judgment that once such allegations are made by the husband and wife as had been made in that case, it was obvious that the marriage of the two cannot in any circumstance be continued any

further. It was submitted that there was an error in the findings of the High Court but the Apex Court did not propose to examine it as it was satisfied that the marriage was dead and sending back the matter to Division Bench to decide it again would mean another exercise in futility leading to tortuous litigation and continued agony of the parties.

16. Analysis of the above referred two judgments of the Apex Court makes it clear that where serious allegations are made in pleadings, the consequent irretrievable break down of the marriage (though not a ground by itself) will be a very important circumstance to be considered while deciding whether divorce should be granted or no . Once such serious allegations are made, it becomes clear that there is no chance of parties coming together or living together again. As observed in para 22 of judgment in V. Bhagat v. Mrs.D. Bhagat (supra), making of the allegations and yet opposing divorce would mean a resolve to live in agony only to make the life miserable for both the parties. Para 23 records a clarification that there must be some extraordinary feature to warrant the grant of divorce on the basis of pleadings and other admitted material without a full trial. While scrutinising the evidence, the said circumstance indicating an irretrievable break down of marriage can be borne in mind to determine

whether the ground alleged is made out. In Chanderkala Trivedi's case (supra) also, it is held that once serious allegations are made in the pleadings of husband and wife, it is obvious that the marriage between the parties is dead and continuing the litigation further is nothing but an exercise in futility and continuing the agony.

17. As far as the allegations in the written statement themselves amounting to cruelty are concerned, there is a judgment of a Single Judge of this Court holding that making wild, reckless and baseless allegations in the written statement itself constitutes cruelty. That is in the case of **Jaishree Mohan Otavnekar v. Mohan Govind Otavnekar - 1987 MLJ 160**. In that matter, the Trial Court had examined the evidence and come to the conclusion that it was difficult to hold the allegations of cruelty made by the appellant wife to be proved. The learned Single Judge did not disturb those findings, but allowed the appeal filed by the wife in view of unwarranted allegations of adultery made by the husband in his written statement. The learned Judge noted that section 13(1)(ia) of the Hindu Marriage Act provides "treating the spouse with cruelty" as a ground for divorce. It will have to be related to two periods, viz. (i) cruelty allegedly practised before the filing of the petition, mental as well as physical, and (ii) cruelty practised upon or after the filing of the petition. It

was submitted before him that the pleadings were not amended to take this plea, but the learned Judge commented in para 7 that after all, these are matters of legal advice. The fact that the respondent husband had made the allegations in his written statement is an admitted fact. Hence, it is not as if the amendment of the petition is an absolute imperative. It was not considered to be very much imperative to incorporate the same in the petition by way of amendment. All that the court was required to see was as to whether the mental torture or cruelty had resulted to the other spouse due to such wanton allegations or not. The learned Judge distinguished an earlier judgment of another Single Judge in the case of **Madanlal Sharma v. Smt. Santosh Sharma - 1980 MLJ 391**, wherein the court found on evidence that the husband had not taken the allegations in the written statement of wife very seriously and held it as a case of condonation of cruelty. In that matter, the learned Judge noted in para 19 of the judgment that the allegations in the written statement relating to the husband's illicit intimacy with the maid-servant were said to have been made by the wife when she returned from the hospital after her delivery. Within a few days thereafter, the maid-servant (who was of 12 to 14 years of age) had been dismissed. In his cross- examination, the husband admitted that the respondent wife did not make any such allegation after the maid-servant left

their service. In para 21 of the judgment, the learned Judge noted that it had been mentioned by the appellant husband himself that the respondent used to make allegations against him only to use abusive and provocative language and that she did not mean that what she abused was a true fact. The case was, therefore, distinct on facts. The learned Judge held in Jaishree's case that mental cruelty resulting from such insult is a matter of judicial inference which has got to be drawn in the facts of each case and commented that in Madanlal Sharma's case the husband had taken the allegations in his strides and the case was distinguishable.

18. The other judgment of a Single Judge is in the case of **Nirmala Manohar Jagesha v. Manohar Shivram Jagesha - AIR 1991 Bombay 259**. In this matter, the husband had sought divorce on the ground of cruelty, desertion and wife suffering from mental disorder. He had referred to her erratic behaviour, mental deficiency and being sexually cold. The wife made allegations of lack of manliness and impotency of the husband in the written statement without any evidence in support. The husband examined himself but the wife did not step into witness box. As far as the allegations of cruelty as made in the petition were concerned, the learned Judge held that the husband had failed to prove them, so also desertion and mental disorder. The decree of divorce was

however upheld due to the wife having made vile and reckless allegations in the written statement itself. The learned Single Judge relied upon the earlier mentioned judgment of the Apex Court in the case of V. Bhagat v. Mrs. D. Bhagat (supra).

19. As far as making of false allegations and those allegations constituting cruelty is concerned, that question has been considered once again by a Division Bench of this Court in **Rajan Vasant Revankar v. Mrs.Shobha Revankar - I (1995) DMC 532**. In that matter, the appellant husband had sought divorce on the ground of desertion and cruelty and the same was dismissed by the Family Court. In appeal, the only ground pressed was that of cruelty. Allegations of physical and mental torture were levelled against the husband and his relatives. It was pointed out that in the written statement the respondent wife had denied the allegations but had stated thereafter that there was a demand for additional dowry (para 6 of the judgment). A certain correspondence had ensued between the parties during the pendency of the proceeding in the Family Court and in one of her letters the respondent attributed illicit relations to his mother and two married sisters. In one of her letters, she questioned whether the appellant had relationship with another woman (para 47 of the judgment). Paragraphs 71 and 73 of Dr.Dastane v. Mrs.

Dastane (AIR 1975 SC 1534) were pressed into service to submit that subsequent conduct of the parties is relevant while considering the case on the ground of cruelty. All these allegations were held to be baseless and wild. While allowing the appeal, the Division Bench held that after the amendment to the Hindu Marriage Act, the concept of "cruelty" has been widened and it means a conduct of such type that the petitioner cannot reasonably be expected to live with the respondent or when it is impossible for the spouses to live together.

20. On the other hand, on behalf of the appellant, it was submitted by her learned counsel Ms.Bhagalia that section 20 of the Hindu Marriage Act requires every petition to state distinctly the nature of the case and the facts on which the claim or the relief was demanded. It was, therefore, imperative that an amendment ought to be carried out to the petition to contend that the allegations in the written statement constituted cruelty. That has not been done in the present case and, therefore, the order passed by the Family Court ought to be interfered and the matter should be sent down if the respondent was keen on maintaining the ground of cruelty. Alternatively, she submitted that at the highest, it could be said that the appellant had failed to prove the allegations made by her. That by itself does not mean that she has made false and baseless allegations.

21. Ms.Bhagalia relied upon a few judgments in support of her propositions. Firstly, she relied upon the judgment of a Single Judge of Allahabad High Court in **Smt. Gurbachan Kaur v. Swaran Singh - AIR 1978 Allahabad 255**. This was a case where the husband had filed a suit for a declaration that his marriage was null and void and when he had alleged that his wife had pre-marital relations, the appellant wife had filed a written statement wherein she made two allegations. Firstly, she made a counter allegation that it was the respondent husband who was having adulterous relation with his sister-in-law and that in collusion with her he had intentionally administered her some kind of slow poison. The respondent husband had contended that these allegations themselves amounted to cruelty and he amended his plaint and sought divorce on this ground. The two courts below had held in favour of the respondent husband that this kind of allegation amounted to cruelty and was a sufficient ground for divorce. The learned Single Judge of the Allahabad High Court, however, took the view that because of the allegation of unchastity made by the husband in his plaint, she got provoked and made the allegation of unchastity against her husband. The learned Judge held that it could not therefore amount to an act of cruelty (para 12 of the judgment). As far as the allegation of administering poison etc. is

concerned, the learned Judge held that there was no sufficient evidence to warrant a conclusion that any such poison was taken by her. On this aspect also, at the end of para 15, he held that this allegation was made in the written statement for the first time and that was also because a false charge of unchastity was made against her.

22. The second judgment relied upon by Ms.Bhagalia is a judgment of a Division Bench of Punjab & Haryana High Court in the case of **Paras Ram v. Kamlesh - AIR 1982 Punjab & Haryana 60**. In this matter, the appellant husband had filed a petition for divorce on the ground of cruelty and in reply the respondent wife had alleged that he had illicit relations with some woman of the village. A judgment of that court in the case of Smt. Jiwan Lata - 1979 Current Law Journal (Civil) 509 was relied upon before the court on this proposition. The Division Bench, however, held that it would indeed be going too far to hold that a mere allegation by itself and that too made by way of a defence in legal pleadings should become legal cruelty in the eye of law and per se be the ground for divorce. The court held that truth or otherwise of such an allegation is the crux of the matter. Therefore, before an allegation of adultery can be deemed as legal cruelty, it must first be proved as factually false. The petitioner in such a situation would have to amend his

petition and plead the false allegation of adultery and then prove it. The Division Bench, however, realised that proving that such an allegation was false would mean a negative burden on the plaintiff. The Division Bench, however, observed in para 13 of the judgment that "the burden of proof however being a negative burden would in the initial stage be a light one...." It was further observed that "however in a case of the present nature where such an allegation has been made in defence in the written statement, it would be a negative burden which can easily be discharged by merely averring that the allegation of adultery is false. It would then be for the spouse alleging the adultery to substantiate the same."

23. The third judgment relied upon by the appellant's counsel is in the case of **Naval Kishore Somani v. Poonam Somani - AIR 1999 Andhra Pradesh 1**. This was a case where certain allegations were made by the respondent wife in her written statement and the appellant sought divorce contending that those allegations amounted to cruelty. The Division Bench accepted in para 7 of his judgment that no doubt false, scandalous, malicious and baseless charges levelled by one party against the other do amount to cruelty. The question however was as to whether the petitioner would be entitled automatically to claim a decree of divorce once the respondent fails to

prove the allegations made in the written statement. In para 13 of the judgment, the Division Bench referred to the definitions of "proved", "disproved" and "not proved" appearing in section 3 of the Evidence Act. It observed that the fact which was not proved does not necessarily mean that it was a false one. It thereafter observed as follows:-

> "The word 'disproved' is akin to word "false". What is 'disproved' is normally said to be a false thing. It will thus be seen that a fact not proved is not necessarily a fact disproved. A fact which is not proved may be true or may be false. A doubt lingers about its truth. Merely because it not proved, one may not jump to the conclusion that it is disproved. A fact is disproved normally by the person, who claims that an alleged fact is not true. For disproving a fact the burden is always on the person, who alleges that the fact is not true."

In para 14, the learned Judges have observed that it was further necessary for the petitioner to prove that the said charges are false. They were also conscious of the fact that it will be a negative burden. Therefore, in the same paragraph, they later on observed that it was contended that such a negative burden cannot be placed on

the petitioner. The learned Judges declined to accept the submission and held that the burden is no doubt light, but the burden is certainly on the petitioner. They finally held in para 21 that when the evidence consisted of only oath against oath, the evidence of one party need not be thrown out. It will only mean that the charges remained unproved and nothing further. It cannot be said that the charges were disproved or false.

24. Having noted the rival submissions, what we have to keep in mind is that we are dealing with the concept of cruelty as a ground for divorce in a matrimonial proceeding. This is a situation arising when one party to the marriage is of the opinion that the other party has treated him or her with cruelty and, therefore, has approached the court for dissolution of the marriage. The definition of cruelty, as developed by the English Courts starting from **Russel v. Russel (1897 AC 395)**, was consistently applied in India while dealing with divorce petitions. Legal cruelty was then defined as a conduct of such a character as to have caused danger to life, limb or health (bodily or mentally) or as to give rise to reasonable apprehension of such danger. However, with the change of time and acceptance of ideas of individual liberty and dignity, the concept of cruelty has undergone a change. Section 10 of the Hindu Marriage Act, 1955, as it stood earlier, enumerated the ground on which a

petition for judicial separation could be presented. Sub-section (b) thereof dealt with ground of cruelty.

Section 10(1)(b) reads as follows:-

> "10. (1) Either party to a marriage, whether solemnized before or after commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party -
>
> (a) .....
>
> (b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party."

25. In **Dr.Dastane v. Smt. Sucheta Dastane - AIR 1975 SC 1534**, the standard of cruelty was reduced from doctrine of danger to the reasonable apprehension that it is harmful or injurious for one spouse to live with the other as envisaged in old section 10(1)(b). It is another matter that in the facts of that case though the court accepted the plea of Dr.Dastane of being harassed almost amounting to cruelty, and held that the respondent was guilty of cruelty, it still came to the conclusion that the appellant had condoned it and the subsequent

conduct of the respondent wife was not such as to amount to a revival of the original cause of action. It is, therefore, that although the appellant did establish the ground of cruelty, as liberally interpreted, the appeal was decided against him.

26. In 1976, the Hindu Marriage Act was amended extensively and now the relevant provision in this behalf is section 13(1)(ia). The statement of objects and reasons of the amending Act clearly declared that the object was to liberlise the provision relating to divorce. The relevant provision now reads as follows:-

> **13. Divorce**.- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by decree of divorce on the ground that the other party -
>
> (ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty."

The amended provision came up for consideration before a Full Bench of this Court in the case of **Dr.Keshavrao Londhe v. Nisha Londhe - AIR 1984 Bombay 413**. While deciding the issue before it, the Full Bench held that Madanlal Sharma's case (supra) did not lay down the

correct position of law. In para 15, it concluded as follows:-

> "15. To conclude, in our view, the cruelty contemplated under S.13(1)(i-a) of the Act neither attracts the old English doctrine of danger or the statutory limits embodied in old S.10(1)(b). The cruelty contemplated is a conduct of such type that the petitioner cannot reasonably be expected to live with the respondent, and, therefore, Madanlal's case (1980 Mah LJ 391) does not lay down the law on the point correctly."

It is material to note that this liberal approach is continued in the subsequent decision of the Apex Court from time to time and recently in the case of **G.V.N. Kameshwara Rao v. G. Jabille - 2002 SCW 162**, the Apex Court again reiterated that to constitute cruelty, it need not be of such a nature as causing reasonable apprehension that it would be harmful to a party to live with other party. The Apex Court held that having regard to the sanctity and aim of marriage in a community life, the Court should consider whether the conduct of the counter petitioner is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible and then only the Court can find that there is a cruelty of the counter petitioner.

27. On this background, if we look to the judgments relied upon by the appellant, it will have to be held that the judgment in Gurbachan Kaur's case (supra) appears to have been decided by taking a view that the respondent wife was provoked by the appellant's insinuations to make the kind of allegations that she made. The judgment is entirely on facts and does not lay down any proposition of law. The judgments in the case of Paras Ram and Naval Kishore (supra) both lay down that an allegation in the written statement would not amount to legal cruelty. Both these judgments, however, accept that the view they were taking will amount to the petitioner being required to discharge a negative burden and it was contended before them that such a negative burden could not be placed on the petitioner. Both these judgments, however, state that the burden will be a light one. In Paras Ram's case, it is stated in para 13 that the burden will be discharged by merely averring that the allegations made are false. If that is the expectation, in the present case the appellant has undoubtedly discharged the burden inasmuch as he has made a specific averment that the allegations made against him and his father were false. It is no doubt true that normally it is the party which goes to the court which has to prove its case, but where a defendant to the litigation rasies a specific plea, the knowledge of which is by and large

with him, the burden to prove those facts will be on such a defendant. In Naval Kishore's case, in para 21 the Division Bench accepts that there is a possibility of the evidence consisting of only oath against oath and then holds that it will only mean that the charges remain unproved and nothing further and the same could not be said to be disproved or false.

28. With great respect to the learned Judges deciding Paras Ram and Naval Kishore, we are of the view that one should be very careful when one makes any such charges in a court of law. It cannot be permitted to a defendant to make charges and then get away by saying that the petitioner must prove that those charges are false. That apart, we are not concerned so much with the strict construction of the definitions of the concept "proved", "not proved" and "disproved". We are concerned with a matrimonial dispute where one party has already come to the court and alleged that the other party has indulged in a cruel behaviour and thereby caused agony to him and that the petitioner can no longer live with the other party. The defence of such a respondent cannot be to make further allegations against the petitioner and then to tell him that he or she must prove that those allegations are false. In our understanding, the moment such serious allegations are made in a written statement, the problem gets compounded. It is undoubtedly true that

it is the petitioner who has approached the court and the court has to consider as to what is the substance in his grievances and the burden of proving the allegations made by him in his petition is on him or her, but in a situation like this if the respondent comes not merely with a defence to the allegations made in the petition so as to continue the marriage but makes counter allegations against the petitioner, it would certainly be open to the petitioner to contend that those further allegations have caused cruelty to him or her and that the respondent must prove those allegations. That apart, it would also be open to him to contend that the moment such false allegations are made, one must look at them in the context of the matrimonial harmony and the question of continuation of marriage. The problem cannot be merely looked at as a problem of making allegations and counter-allegations and as to whose allegations are true or false. The moment such allegations are made in a written statement, it becomes clear that there is an irretrievable break down of the marriage. That would certainly be a factor to be considered while deciding the plea of cruelty raised by the petitioner as held by the Apex Court in the case of V. Bhagat v. Mrs. D. Bhagat as also in the case of Chanderkala Trivedi. The two cases of Gurbachan Kaur and Paras (supra) Ram were decided prior to this liberal view taken by the Apex Court and though the judgment in Naval Kishore is a

subsequent one, the judgments of the Apex Court do not appear to have been cited before the learned Judges. In a case of oath against oath, it is difficult to know the complete truth behind the allegations made by either of the parties, but if a situation emerges that such allegations when made by one party are not proved and still are being maintained by that party and not being withdrawn, it will be permissible to the other party to rely upon the mental agony arising out of such allegations. It is possible for the appellant's counsel to contend that some such incidents might have taken place as alleged by the appellant, otherwise she would not have made such allegations. But it is no use making allegations if one is not in a position to prove them and, as stated above, we are concerned with the consequence of such allegations on the other party whether they are proved or not. In the present case, the appellant as well as his mother both have deposed that the allegations were false and they have caused them a severe agony. Can it be said that they have taken those allegations in strides and they should be driven to amend the petition and then lead evidence thereafter? This will only mean prolonging the agony which both the parties are already undergoing. It is no doubt true that as provided under section 23(1)(a) of the Hindu Marriage Act, one is not to be permitted to take advantage of his or her wrong, but that has got to be established, and

unless established it cannot be contended that the petitioner is trying to take advantage of his own wrong.

29. We have considered the submissions made by the rival counsel. We are conscious of the caution expressed by the Apex Court in the case of V. Bhagat v. Mrs. D. Bhagat that merely because there are allegations and counter-allegations, a decree of divorce cannot follow. The court has, however, noted that there must be some extraordinary feature to warrant a divorce on the basis of the pleadings indicating irretrievably breaking of marriage. In Chanderkala Trivedi's case (supra) also serious allegations had been made. The court observed that it was obvious that the marriage of the two could not be continued in those circumstances any further. Even in V. Bhagat v. Mrs. D. Bhagat, the court observed that in spite of making various allegations of the husband and his family being insane, the wife wanted to live with him. The obvious conclusion was that she had resolved to live in agony only to make the life a miserable hell for her husband. As noted earlier, the two Single Judges of this Court have taken a view that baseless allegations in the written statement constitute cruelty. A somewhat contrary view in Madanlal Sharma's case (supra) has been explained by a Single Judge in Jaishree Mohan Otavnekar's case (supra) and subsequently overruled in Dr.Keshavrao Londe's case (supra).

30. What we have to note is that when one party to the petition has sought divorce on some ground and the respondent to that petition does not merely defend it to get it defeated, but makes further serious allegations against the Petitioner, it becomes a clear step towards the dissolution of the marriage. In the present matter, the Petitioner has approached the court seeking dissolution of his marriage. It is his case that there is a failure of the marriage and he seeks to point it out by invoking a ground available under the law. At that point of time, if the respondent makes a counter-allegation in the written statement, that by itself shows a prima facie failure of the marriage. As a normal rule whether cruelty as a matrimonial wrong has been established is a question of fact and in which case it will have to be determined by taking into account the particular individual's conduct and the circumstances of the case and there cannot be any general rule. Therefore, section 20 of the Hindu Marriage Act requires every petition to distinctly state the nature of the case and the facts, on the basis of which a claim is made to the relief. At the same time, where the Petitioner makes the grievance of cruelty on the basis of some instances and fails to establish the same, but the respondent comes up with serious allegations (such as adultery, insanity or unchastity), and fails to prove the same, would it not

amount by itself to cruelty by the respondent? Will it be expected of the court to tell the Petitioner to amend his petition in view of those allegations in the written statement and send him back to the Trial Court when on the face of it those allegations constitute cruelty and particularly when the respondent produces no credible evidence in support thereof? As noted earlier in the case of Chanderkala Trivedi (supra), the Apex Court declined to send back the matter to look into the findings on the aspect of cruelty once again. Same was the approach in the case of V. Bhagat v. Mrs. D. Bhagat (supra). In the case of Jaishree Mohan Otavnekar (supra), the learned Single Judge has observed that it need not be considered to be very much imperative that in a case of this type, the petition should be amended and further evidence be directed. Certain inference from such pleadings has got to be drawn because it almost amounts to an admission of cruelty. It may not amount to acceptance of the specific grievance made by the Petitioner, but, on the other hand, it amounts to providing much more grave and serious instances of cruelty. It clearly amounts to irretrievable break down of the marriage and in a situation like this, the Court will be failing in its duty if the parties are directed to amend the pleadings and again spend much more time in a re-trial where the conclusion is forgone and obvious.

31. In any case, in the facts of the present case, as we have noted, the parties have led their evidence on the allegations made by the appellant wife although no amendment was carried out to the petition subsequent to the allegations made in the written statement. The respondent and his mother have both stated that the allegations are false and have caused mental agony to them. There is no effective cross-examination of either of them. The case made out by the appellant was not put to them. When it came to her evidence, the appellant was however specifically cross-examined on the allegations made by her. It was specifically put to her that the respondent, his mother and the appellant went to the residence of Leena to ascertain as to what were the facts. That was accepted by the respondent. It was also put to her that the relatives at the residence of Leena became furious on knowing the allegations and even they assaulted the appellant. The appellant has of course denied what is put to her. However, nothing prevented her from examining Vivek, husband of Leena, whom she has quoted in her affidavit as having become angry on learning about the alleged relationship between the respondent and Leena and that he wanted to thrash the respondent. If he was such a bold person, the respondent ought to have brought him into the witness box. It is, therefore, clear that she has failed to establish her allegations. Can it then be said that she has only

failed to establish her allegations, but it is not proved by the respondent husband that her allegations were false and baseless? In a matrimonial matter, one cannot apply the standard of stricter evidence. Nothing prevented her from establishing her allegations. The respondent could not have established the negative by leading any further evidence that the allegations made by the wife were false. The appellant had made the allegations. The burden was on her. She had failed to prove those allegations. Once she fails to prove those allegations and if those allegations are not in consonance with matrimonial relationship, and the husband complains that they have caused him agony, the inference that they constitute cruelty has to follow.

32. In the circumstances, we are satisfied that the learned Judge was right in coming to the conclusion that the allegations made by the appellant wife were baseless and false and constituted a cruelty. He was, therefore, right in granting the decree of divorce on that ground. Similarly, he was equally right in rejecting her petition for maintenance under section 18 of the Hindu Adoption and Maintenance Act. This was because once the divorce was granted, petition under section 18 of that Act could not be maintained. Similarly, the learned Judge was right in his conclusion that no permanent alimony could be awarded to the appellant wife under

section 25 of the Hindu Marriage Act inasmuch as it was clearly established that the income of the appellant wife was better than the respondent husband. Both the appeals are, therefore, dismissed. There will not be any order as to costs.

33. Although we are dismissing both these appeals, we propose to make a separate provision with respect to the request of the appellant for return of her articles and clothes mentioned in para (Q) of the written statement filed by the appellant. These articles include valuable gold ornaments. It was put to her in para 15 of her cross-examination that those ornaments were with her and she has denied that suggestion. The counsel for the respondent, however, accepted that some articles (though not ornaments) were remaining and she offered to return those articles. The appellant, however, declined to take those articles contending that she will not collect those articles unless given along with her gold ornaments. As far as this aspect is concerned, we do not find that the parties have led sufficient evidence on it and the evidence is only in the nature of word against word. The learned Trial Judge has therefore rejected this claim, but there is not much discussion thereon. Hence we would like to reserve and revive the appellant's right to file a fresh proceeding before the Family Court if she is so advised to seek return of these articles allegedly not

returned to her by permitting the appellant to file an application in the Trial Court only for this purpose which is otherwise to be decided under section 27 of the Hindu Marriage Act while disposing of the proceeding before the Trial Court. The Trial Court will decide the application when made in accordance with law.

34. The respondent had made a statement when the appeal came up for consideration for admission that he will not proceed to take any further steps to remarry until further orders are passed by this Court. In view of the dismissal of these two appeals, that fetter is now removed.

35. Ms.Bhagalia, learned counsel for the appellant, makes a request that the restriction be continued for a further period of 8 weeks. Mr.Kansara h/f Mrs.Rao for the respondent opposes the request. However, considering that the appellant should not be denied the last opportunity in case she wants to challenge the order, we direct that the restriction recorded at the time of admission of these appeals will continue for a further period of 8 weeks.

(H.L. GOKHALE, J.)

(SMT. V.K. TAHILRAMANI, J.)